

## VSP Public Comment

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**From:** CONQUIP [conquip@mac.com]

**Sent:** Saturday, June 18, 2005 5:27 AM

**Subject:** Does NASED and HAVA require 2002 VSS for qualifying voting systems

The question has been raised as to whether HAVA requires that voting systems that are tested and qualified since its enactment must meet 2002 Voting System Standards. The following is an analysis of whether the current voting systems being proposed for use in California meet the requirements of federal and state law. It also appears that some previously certified systems did not meet federal and state law requirements.

The term "voting system" is an important term. All components, devices, procedures for use, operating software, etc. are part of the "voting system". Both HAVA and California state law help define what is a "voting system". When checking the NASED website for currently qualified "voting systems" be sure and check under which standards they were qualified as a voting system. Just because some components were tested to 2002 VSS does not qualify the "voting system" to those standards.

The 2002 Voting System Standards are "voluntary guidelines" until adopted by an individual state. California state law adopts the FEC voluntary guidelines as the guidelines to be followed in testing and certifying voting systems used in this state. The guidelines are voluntary. Once a state, by law, adopts them then the vendor offering the voting system must conform to those requirements. The Secretary of State has a Constitutional duty to make sure that all voting systems conform to those guidelines.

Until the EAC develops and adopts new voluntary guidelines HAVA itself states that the voluntary guidelines in effect at the time HAVA is enacted shall be the guidelines used. To date the only current voluntary guidelines adopted by the FEC are the 2002 Voting System Standards (2002 VSS).

The 2002 VSS required that voting systems be examined and qualified as a "system". State law refers to "systems". The core of any computerized "system" is the main program that makes the system, including all devices and their individual firmware, work together. In the case of Diebold Election Systems, Inc. (DESI) that main program is their Global Election Management System (GEMS). It is the central program that controls the ballot definitions, programs the memory cards with those definitions, and then takes in the ballot choices and creates a database of those ballot choices, tabulates those votes, and then reports those votes.

The prior qualified voting systems, such as the Diebold TS-R6 direct recording electronic device (DRE or touchscreen vote recorder), have the ability to print out a tape, as required by California law, of the number of votes resident on the memory card at the opening of the polls, and then the total of votes accumulated per candidate or measure at the close of the polls. In order to make the DRE capable of printing out a ballot image from within itself, its resident programming had to be changed. The programming also had to be changed so that a voter may be able to cancel a voted paper ballot because of an error on the printed ballot. That is a new requirement of the firmware (resident program) in the DRE.

Before it merely had to record those screen "touches" that corresponded to the "ballot definitions", and accumulate them into a database. Now it not only has to do that, it must wait to accumulate them until the voter has made a final decision. That means there has to be a change in the firmware resident in the DRE.

I state this to put into context the NASED Advisory of April 18, 2005 (see below). They try to make it acceptable to test a new "device" to 2002 VSS and yet make it acceptable to add it to a prior 1990 VSS qualified voting system without

having to make the entire voting system qualified to 2002 VSS. It is my opinion they have failed in their efforts. Because of that, voters are in a good position to challenge what NASED, and consequently state election officials, have been doing since HAVA passed.

1. NASED should be challenged on their authority to develop exceptions to HAVA without hearings, public input, or legal findings or opinions.
2. Even if their Advisory of February, 2003 were found to be legally binding, they have not been following their own adopted procedures. In their 2003 Advisory they stated that "any changes to any voting system" **entering testing after January 8, 2003 will be tested to 2002 VSS**. There have been multiple changes in software versions and devices added since January 8, 2003 that were tested and qualified to 1990 VSS, not the 2002 VSS.
3. The main computer program for the major manufacturers, their election management programs, have had several version changes, including major changes, and yet were tested to 1990 VSS standards after January 8, 2003.
4. The addition of a printer capable of producing a printed paper copy of a voter's ballot choices requires not only a printer, but also the firmware program to control the printer, and a firmware change in the DRE itself to communicate with the printer. Even under their April 2005 Addendum the current Diebold TSx with AccuView (and the ES &S, Sequoia, etc.) requires that the entire voting system be tested and qualified to 2002 VSS because it is impossible to add a printer to a DRE without altering or upgrading the firmware in the DRE and the main election management software. Their Addendum states specifically: After January 1, 2005, **only those new devices** not currently a part, package or upgrade to an existing 1990 qualified voting system may be tested for qualification with such voting system. These devices must be tested and meet the 2002 Voting Systems Standards and **no other portion of a previously 1990 qualified system may be altered or upgraded to accept this device**.

It would appear that there are multiple electronic voting systems that have been illegally federally qualified, and stated certified.

California law and the Secretary of State's Procedures require that all voting systems shall meet the requirements of federal and state law. Perhaps it will take judicial challenges in both federal and state courts to not only require the Secretary of State to obey state law, but also challenging the issuance of Qualification Numbers under both HAVA and NASED's own adopted advisories.

It is also a possibility that currently certified voting systems being used in this state were illegally certified and may not be used in an election.

California law states specifically that no voting system can be used in an election unless it complies with federal and state law. The Secretary of State is required to sign a certificate attesting that the voting system meets all federal and state laws. It is that certificate that is the basis for the list of "approved" voting systems for use in California.

The days of allowing the illegal use of voting systems in this state must end. For too long election officials, and the Secretary of State have allowed the law and procedures to be skirted for the sake of expediency. The beginning of the 19000 area of the California Election Code states clearly, when courts review the interpretation of the Election Code, their guiding standard of review:

**19001. This division shall be liberally construed so that the real will of the electors will not be defeated by any informality or failure to comply with all of the provisions of the law.**

Currently GEMS 1.18.22 has not been tested and received a federal Qualification Number to 2002 VSS. More than that, the Diebold TSx with AccuView voting system, currently seeking state certification, has not obtained a Federal Qualification

number as a result of testing and qualification making it "totally compliant under 2002 VSS".

I hope that other interested people will utilize this analysis when preparing their written comments to the Secretary of State,

state legislators, and possible judicial authorities. There is also a right under HAVA to file a formal complaint if we believe a

federal or state law related to our vote under HAVA Title III has, is, or will be violated. The California Secretary of State's website

has that form available in PDF format. It is my opinion that under the provisions of HAVA the current voting systems in certified for

use since February, 2003 have, are, and the current voting system applications before the Secretary, if certified, will be in

violation of Title III of HAVA.

Our vote is too critical to allow the voting systems that we are required to

use to be allowed to be unreliable, inaccurate, and vulnerable to fraud and manipulation. Laws have been passed over the years

to insure that voters can be confident that our votes are recorded and counted accurately. When those laws are ignored or their intent

circumvented for the expediency of election officials, it is not only a violation of law, it is a betrayal of public officials' oath of office and

their duty to the citizens of California.

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Note: I am not an attorney. These are my own opinions after reviewing the law. I welcome attorneys and other individuals to investigate

further. Please also inform me if there are errors in my interpretation.

#### **Further information:**

HAVA 222 (from pages 45-46 of the PDF version)

(e) SPECIAL RULE FOR INITIAL SET OF GUIDELINES.—

Notwithstanding any other provision of this part, the most recent set of voting system standards adopted by the Federal Election Commission prior to the date of the enactment of this Act **shall** be deemed to have been adopted by the Commission as of the date of the enactment of this Act as **the first set of voluntary voting system guidelines** adopted under this part.

Section 231 (from pages 46-49 of the PDF version)

(d) TRANSITION.—Until such time as the Commission provides for the testing, certification, decertification, and recertification of voting system hardware and software by accredited laboratories under this section, the accreditation of laboratories and **the procedure for the testing, certification**, decertification, and recertification **of voting system hardware and software used as of the date of the enactment of this Act shall remain in effect.**

NASED interpretation of the above federal law:

As a recommendation to the National Association of State Election Directors (NASED) for approval at their February meeting, the NASED Voting Systems Board adopted the following procedures related to testing by

Independent Testing Authorities (ITA) for NASED Qualified Testing:

- All testing of any changes to any voting system previously qualified by NASED or entering testing after January 8, 2003, will be to the 2002 Voting Systems Standards (VSS) as approved by the Federal Election Commission.
  - Any modification of pre-existing systems will still be considered 1990 Voting Systems Standards systems. Modifications made to any 1990 standards units as qualified by NASED will be recognized by NASED through January, 1, 2005.
  - After January 1, 2005, NASED will no longer offer ITA testing for revisions to any voting system approved prior to the use 2002 Voting Systems Standards.
  - After January 1, 2005, any revisions which do not make the voting system totally compliant with the 2002 VSS become non-qualified under the national testing program.
- Adopted as recommendations by NASED Voting Systems Board to NASED on 1-7-2003 and subsequently adopted by NASED, February 2003.

On April 18, 2005 NASED issued another advisory for what appears to provide clarification so that a printing capability could be added to prior qualified voting systems. Unfortunately, in my opinion, they neither made it clear, nor does it help previously 1990 VSS qualified voting systems meet their own requirements (and especially not HAVA, an advisory from NASED cannot trump federal law).

At the February, 2003 meeting of the National Association of State Election Directors (NASED), the Voting Systems Board adopted a number of procedures related to voting system testing by NASED accredited Independent Test Authorities (ITA).

The last two of these procedures took effect as of January 1, 2005 and stated that:

- After January 1, 2005, NASED will no longer offer ITA testing for revisions to any voting system approved prior to the use [of] 2002 Voting Systems Standards.
- **After January 1, 2005, any revisions** which do not make the voting system **totally compliant** with the 2002 VSS become **non-qualified under the national testing program**.

This addendum serves only as clarification of these procedures and in no way diminishes or negates the effect of any procedure adopted in February 2003.

In order to accommodate new devices which may interface with either 2002 or 1990 qualified voting systems with the goal of making those systems HAVA compliant, NASED adds the following statement to the 2003 Testing Update document:

- After January 1, 2005, only those new devices not currently a part, package or upgrade to an existing 1990 qualified voting system may be tested for qualification with such voting system. These devices must be tested and meet the 2002 Voting Systems Standards and no other portion of a previously 1990 qualified system may be altered or upgraded to accept this device.

Adopted by the NASED Voting Systems Board April 18, 2005.

When reviewing the proposed new voting system standards soon to be published by the EAC I am submitting the following.

As part of the guidelines to be developed for voting systems, HAVA requires they include the following:

(2) TECHNICAL SUPPORT.—

The technical support provided under paragraph (1) shall include intramural research and development in areas to support the development of the voluntary voting system guidelines under this part, including

- (A) the security of computers, computer networks, and computer data storage used in voting systems, including the computerized list required under section 303(a);
- (B) methods to detect and prevent fraud;

The California Secretary of State should immediately examine all voting systems in California currently in use or proposed for use under the above referenced criteria. He may employ up to three technical experts for such examination. If it is for an existing voting system the county is supposed to pay the costs. If it is for a proposed system the vendor is required to pay.